

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/10
Date: 16 August 2011

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

***IN THE CASE OF
THE PROSECUTOR V. CALLIXTE MBARUSHIMANA***

Public

Decision on “Defence request to deny the use of certain incriminating evidence at the confirmation hearing” and postponement of confirmation hearing

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Anton Steynberg, Senior Trial Lawyer

Counsel for the Defence

Mr Nicholas Kaufman
Ms Yaël Vias-Gvirsman

Legal Representatives of the Victims

Mr Hervé Diakiese
Mr Mayombo Kassongo
Mr Ghislain Mabanga

Unrepresented Victims

Legal Representatives of the Applicants

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

States Representatives

**The Office of Public Counsel for the
Defence**

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber I of the International Criminal Court (“Chamber” and “Court” respectively) hereby renders the following decision:

Procedural History

1. The present decision contains the full reasoning for the “Decision postponing the commencement of the confirmation hearing”, issued by the Chamber on 16 August 2011 (“Postponement Decision”).¹
2. On 12 May 2011, the Single Judge issued the “Decision on the ‘Prosecution’s request for the assessment of the English proficiency of Callixte Mbarushimana’” (“Language Proficiency Decision”).² In this decision, the Single Judge found that the suspect did not understand English well enough for the Prosecutor to satisfy his disclosure obligations by only disclosing evidence in English.³ The Prosecutor was ordered to “disclose to the Defence, as soon as possible and no later than 1 June, the French translations [...] of all witness statements which have not been previously disclosed in Kinyarwanda”.⁴
3. The operative “Re-filing of the Prosecution’s Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rule 121(3)” was filed by the Prosecutor on 25 July 2011.⁵
4. On 8 August 2011, the Defence filed the “Defence request to deny the use of certain incriminating evidence at the confirmation hearing” (“Requests”),⁶ wherein the Defence requests that, for the purposes of the confirmation hearing, the Prosecutor be denied use, as incriminating evidence, of (i) transcripts of witness interviews disclosed in English, for which only Kinyarwanda audio files, as opposed

¹ ICC-01/04-01/10-374.

² ICC-01/04-01/10-145.

³ *Ibid.*, p. 6.

⁴ *Ibid.*, p. 8.

⁵ ICC-01/04-01/10-311.

⁶ ICC-01/04-01/10-343.

to transcripts are available ("First Defence Request"),⁷ and (ii) interviews where English and Kinyarwanda transcripts were disclosed to the Defence, but without the relevant audio files ("Second Defence Request").⁸

5. The Prosecutor responded to the Requests in the "Prosecution's response to Defence Request to deny the use of certain incriminating evidence at the Confirmation Hearing," filed *ex parte* Prosecution and Defence only on 11 August 2011 ("Response").⁹

6. On 12 August 2011, the Single Judge issued the "Decision requesting further information on the 'Defence request to deny the use of certain incriminating evidence at the confirmation hearing'" ("Information Request Decision").¹⁰ In this decision, the Single Judge sought clarification as to which statements are affected by the disclosure issues raised in the Defence Requests.¹¹ The Defence complied with the Information Request Decision on 15 August 2011,¹² providing the Chamber with confidential annexes containing the witness statements affected by the allegedly deficient disclosure.

7. On 16 August 2011, the Prosecutor filed, pursuant to the Single Judge's order,¹³ its "Prosecution's observations on 'Defence Compliance with Decision ICC-01/04-01/10-359'",¹⁴ whereby the Prosecutor largely confirms the scope of the information identified by the Defence and notices that the second interview with witness 561 was

⁷ *Ibid.*, para. 12(i).

⁸ *Ibid.*, para. 12(ii).

⁹ ICC-01/04-01/10-353. This filing was reclassified to public on 12 August 2011. See ICC-01/04-01/10-359, p. 5.

¹⁰ ICC-01/04-01/10-359.

¹¹ *Ibid.*, p. 4.

¹² "Defence Compliance with Decision ICC-01/04-01/10-359", ICC-01/04-01/10-368. Later on 15 August 2011, the Defence filed a request for a retroactive extension of time, apologizing for making the filing 10 minutes after the expiry of the deadline given by the Chamber. ICC-01/04-01/10-368. Given that the Defence was complying with a request by the Chamber and the *de minimis* nature of the deadline violation, the Chamber considers it in the interests of justice to consider the submitted additional information in full.

¹³ "Decision requesting observations on the 'Defence Compliance with Decision ICC-01/04-01/10-359'", 15 August 2011, ICC-01/04-01/10-372.

¹⁴ ICC-01/04-01/10-373.

only disclosed in English.¹⁵ Consistent with the Language Proficiency Decision, the Prosecutor indicates that he will not rely on this interview transcript at the hearing.¹⁶

8. The confirmation hearing was, prior to the present decision, set to commence on 17 August 2011.¹⁷

Submissions

9. In the submission containing its Requests, the Defence argues that the Prosecutor has not complied with the Language Proficiency Decision. On 1 June 2011, the Prosecutor disclosed materials relating to thirteen witnesses' interviews conducted in English and Kinyarwanda ("Interviews") to the Defence.¹⁸ The Defence noted that some of the interview transcripts were only disclosed in English and that the Prosecutor said they would provide the Defence with Kinyarwanda translations for the remaining interview transcripts "in due course."¹⁹ However, when the transcripts were still undelivered as of 28 June 2011, the Defence sent an email regarding this issue to the Prosecutor.²⁰ The Prosecutor's response to this email indicates that the Prosecutor was not intending to disclose any additional translations of interview transcripts or any corresponding audio to interviews where English and Kinyarwanda transcripts had already been disclosed.²¹

10. The Defence argues that the inability to work from a "unified media" with the suspect has caused prejudice to the Defence and that the Prosecutor's lack of disclosure contravenes both the Language Proficiency Decision and the Rules of Procedure and Evidence ("Rules").²² The Defence also alleges that the Prosecutor's failure to provide the audio files of those Interviews for which transcripts were

¹⁵ *Ibid.*, paras 4-5.

¹⁶ See *Ibid.*, para. 6.

¹⁷ ICC-01/04-01/10-211.

¹⁸ Requests, para. 2.

¹⁹ *Ibid.*

²⁰ *Ibid.*, para. 3.

²¹ *Ibid.*, paras 3-4.

²² *Ibid.*, paras 5, 6, 9. The Defence specifically argues that Rules 111 and 112 of the Rules implicitly require that interviews should always have written transcriptions and that it contravenes this legislative regime for there not to be transcriptions. See *Ibid.*, paras 6-7.

disclosed in English and Kinyarwanda has deprived the suspect of the opportunity to fully understand the transcribed questions of the investigator and to verify the accuracy of the translation provided by way of comparison with the audio file.²³

11. In his Response, the Prosecutor objects to the granting of the Requests. The Prosecutor argues that he has complied with his disclosure obligations by disclosing all witness statements in English and Kinyarwanda, either in written or audio form.²⁴ The Prosecutor also challenges the Defence interpretation of the Rules, arguing that transcriptions need only be produced “as soon as practicable” and that contemporaneous transcripts are not required.²⁵ The Prosecutor confirms that he did inform the Defence that he would provide the Defence with the Kinyarwanda portions of the transcripts “in due course”, but the Prosecutor clarifies that he did not promise that these translations would be provided before the confirmation hearing.²⁶

12. The Prosecutor also argues that the Defence request for exclusion of such incriminating evidence is neither fair nor proportionate to the prejudice suffered, if any.²⁷ The Prosecutor submits that the request for exclusion should not be granted on grounds that the Defence has “effectively ruled out any other relief by choosing to ignore the issue at hand until the eve of the confirmation hearing”.²⁸

13. In its filing complying with the Information Request Decision, the Defence outlines a significant number of documents which are affected by the disclosure deficiencies identified in its Requests. The Defence highlights: (i) 2856 pages of interviews where, though transcripts in both English and Kinyarwanda were

²³ *Ibid.*, paras 9-10.

²⁴ Response, para. 11.

²⁵ *Ibid.*, para. 14. The Prosecutor notes elsewhere that the delays in getting Kinyarwanda transcripts of the interviews has been caused by difficulties in finding qualified Kinyarwanda interpreters. *Ibid.*, para. 13.

²⁶ *Ibid.*, para. 13 at n. 11.

²⁷ *Ibid.*, para. 19.

²⁸ *Ibid.*

disclosed, no audio tapes of the interviews were given to the Defence²⁹ and (ii) 2681 pages of interviews where, though both English and Kinyarwanda audio tapes were disclosed, only English transcripts were provided.³⁰

Discussion

14. The Chamber takes note of articles 61 and 67 of the Rome Statute ("Statute") and rules 76, 111, 112 and 121 of the Rules. Specifically, article 67(1)(b) of the Statute requires that the Defence be given "adequate time and facilities for the preparation of the defence". Rule 76(1) of the Rules provides that "[t]he Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence." Rule 76(3) of the Rules notes that "[t]he statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks."

15. At the outset, the Chamber wishes to express its profound dissatisfaction with the way both parties have behaved regarding these disclosure issues. The Chamber has been bombarded by the parties, mainly the Defence,³¹ with filings on a series of issues that can mostly be considered minor in comparison with the fact that the Defence has not been able to appropriately process thousands of pages of important information. It is inexcusable that this issue was not brought to the Chamber's attention in sufficient time for it to be handled properly before the presently scheduled confirmation hearing date of 17 August 2011. For the reasons explained below, the Chamber feels compelled to postpone the hearing in the wake of both parties' failure to handle their pre-trial obligations in a manner befitting the professionalism demanded when litigating before the International Criminal Court.

²⁹ See ICC-01/04-01/10-368, Annex 1.

³⁰ See *Ibid.*, Annex 2. See also ICC-01/04-01/10-369, p.3.

³¹ The Chamber notes in the last month alone the Defence has filed 36 motions. Even excluding responses or filings complying with requests from the Chamber, the Defence has filed 27 requests/notifications/observations/ etc. in the past month.

The Defence has been on notice of the Prosecutor's failure of its disclosure obligations for some time and has not brought to the Chamber its concerns in a timely manner.

16. The Chamber notes that the fact of the Prosecutor's failure to provide the Defence with Kinyarwanda versions of English transcripts or French translations thereof, which forms the basis of the Requests, was known to the Defence since 1 June 2011, when the disclosure of the statements at issue took place. Even if it were to be accepted that the Defence initially believed that the Prosecutor was willing to disclose the outstanding transcripts or translations in time for the Defence to adequately prepare for the confirmation hearing, it must have been clear to the Defence as early as 28 June 2011, or shortly thereafter, when the Prosecutor responded to the Defence's query regarding that matter,³² that the Prosecutor was unlikely to provide the said documents. The Defence does not conceal the fact that such was its own interpretation of the Prosecutor's response to their query. The Defence states that "[t]he Prosecution has apparently subscribed to the belief that so long as it has communicated the record of a witness's questioning in audio format then it is absolved from the need to supply a transcript of that same recording [...] in a language which [...] the suspect understands best".³³

17. The Chamber points out that the Requests were filed more than two months after the said transcripts and audio recordings were disclosed to the Defence and more than a month after it became abundantly clear that the Prosecutor was unlikely to provide these documents in the requested format and language, sufficiently in advance of the hearing, to enable the suspect to properly examine them and adequately prepare his defence. The prolonged lack of reaction on the part of the Defence to what it perceived as a breach of its procedural rights could be legitimately regarded by the Prosecutor as a tacit approval of the manner in which the disclosure was effected.

³² Requests, para. 3.

³³ *Ibid.*, para. 4.

18. Further, the Defence's failure to promptly inform the Chamber of its disclosure concerns made it impossible for the Chamber to intervene in a way that enabled the Prosecutor to disclose the required transcripts and/or translations in adequate time before the confirmation hearing. The Chamber recalls the Appeals Chamber's Majority ruling given in the *Katanga and Ngudjolo* case:³⁴

"[a] party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right. This is as it should be in order for the Trial Chamber to take account of the interests of the other parties to and participants in the proceedings and of the statutory injunction for fairness and expeditiousness. The Appeals Chamber agrees with the Trial Chamber's conclusion that parties must submit motions that have repercussions on the conduct of the trial in "a timely manner". The Appeals Chamber interprets 'timely manner' to mean that the parties must act within a reasonable time. However, what is reasonable or unreasonable in relation to time always turns on all the circumstances of the case, including the conduct of the person seeking the Court's assistance."

19. The Chamber notes that the Requests were only filed on 8 August 2011, 9 days before the scheduled commencement of the confirmation hearing, whereas one of the measures sought by the Defence – a ban on the Prosecutor's use of the evidence affected by the allegedly inadequate disclosure – would substantially disadvantage the Prosecutor in that he would be unable to replace the excluded evidence with other evidence, or otherwise remedy the grievance of the Defence. The Chamber is thus of the view that the Defence failed to exercise due diligence in asserting its right to receive witnesses' statements in a language which the suspect fully understands and speaks. The request for exclusion of the evidence affected by the issue identified by the Defence was not filed in a timely manner.

³⁴ "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings"", 19 July 2010, ICC-01/04-01/07-2259, para. 54.

The Prosecutor cannot satisfy his disclosure obligations by turning over significant portions of his evidence in a way that is unmanageable for the Defence.

20. Turning to the Prosecution, the Chamber is not persuaded by the Prosecutor's arguments that he has complied with their disclosure obligations by merely providing to the suspect the English and Kinyarwanda audio tapes of the Interviews, together with the English transcripts. As the Appeals Chamber has noted, "the tenor of the disclosure regime established by the Statute and the Rules of Procedure and Evidence is that the Prosecutor is ordinarily obliged to make *full disclosure*, save for where specific provision is made for restrictions on disclosure to be permitted (emphasis added)".³⁵ By not providing full French or Kinyarwanda transcripts for the interviews, the Prosecutor has forced the Defence to work with a situation where suspect and counsel cannot meaningfully discuss the contents of over 60 hours of recorded interviews allegedly important to this case. As such, the Prosecutor has not respected the rationale behind the Language Proficiency Decision and rule 76(3) of the Rules.

21. Further, the Prosecutor's Response reveals that he was aware that it was his obligation to produce Kinyarwanda transcripts where no such transcripts existed. By promising to devote the Prosecution's resources to disclose Kinyarwanda transcripts to the Defence "in due course", the Prosecutor's actions evinced an understanding that this information was necessary for the proper preparation of the Defence. By ensuring that these translated transcriptions would be delivered to the Defence "in due course", the Prosecutor also gave the Defence a reasonable expectation that a "unified media" would be forthcoming before the confirmation hearing.

22. Given the length of these interviews, their alleged importance to the Prosecutor's case, the purpose of the confirmation hearing, the added difficulty in processing an audio recording as opposed to a written transcript and recalling the

³⁵ "Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008", 11 July 2008, ICC-01/04-01/06-1433, para. 45.

Language Proficiency Decision, the Chamber finds that the Prosecutor had an obligation in this case to create Kinyarwanda or French transcripts of all Interviews currently transcribed in English only. This finding is premised on the need to ensure that disclosure is given in such a way that the Defence can meaningfully prepare its defence pursuant to article 67(1) of the Statute.³⁶ However, for Interviews where both English and Kinyarwanda transcripts have been disclosed to the Defence, the Chamber deems that adequate information has been disclosed to the Defence to allow it to prepare for the confirmation hearing and that it is unnecessary to require that the audio of these Interviews be disclosed at this point in the proceedings.

The need for the postponement of the confirmation hearing.

23. The Chamber recalls rule 121(7) of the Rules, which reads, in part, that “[t]he Pre-Trial Chamber may [...], on its own motion, decide to postpone the [confirmation] hearing”.

24. For the reasons outlined above, the Chamber is of the view that the best course to ensure a fair and expeditious conduct of the proceedings leading to the confirmation hearing is to postpone the commencement of the hearing for a reasonable time, so that the Prosecutor can either: (i) disclose French or Kinyarwanda transcripts of the witnesses’ interviews which are currently transcribed only in English or (ii) provide the Defence, as allowed by article 61(5) of the Statute, with French summaries of this evidence. Such summaries shall contain the core of the incriminating evidence on which the Prosecutor intends to rely at the confirmation hearing and, as well, all potentially exculpatory information, under a separate title. As to a timeframe for this disclosure, the Chamber draws an analogy to the time limits for new evidence in rule 121 of the Rules and will require the Prosecutor to make the necessary disclosures fifteen days before the date of the rescheduled confirmation hearing.

³⁶ The Chamber declines to examine the issue as to whether the Prosecutor in another case could satisfy its disclosure obligations under rule 76(3) of the Rules by disclosing evidence in only audio format.

25. The Chamber is mindful that, in the latter case, the Prosecutor will also need to modify its Document Containing the Charges and List of Evidence accordingly, in order to relate the facts to the summaries instead of the English only transcripts. The Chamber will only consider evidence of these interviews at the confirmation hearing if they have been disclosed to the Defence in written form in a language which the Suspect fully understands and speaks.

26. By the same token, the Chamber is of the view that, once in possession of French or Kinyarwanda transcripts and/or summaries of the Interviews, the Interviews' admissibility at the confirmation hearing will not be affected by the fact that the relevant audio recordings were not disclosed to the Defence.

27. The Chamber emphasises to both parties that the purpose of this postponement is solely to facilitate the proper disclosure of the Interviews identified in the Defence Requests. The postponement is the Chamber's effort to give the Prosecutor an opportunity to present his case as he intended while respecting the rights of the suspect. The Chamber does not intend to restart the time limits allowing for the filing of new evidence under rule 121 of the Rules.

FOR THESE REASONS, THE CHAMBER:

GRANTS the First Defence Request;

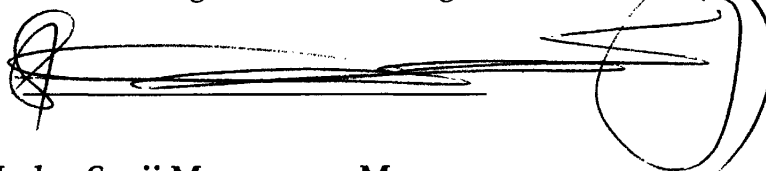
REJECTS the Second Defence Request;

DECIDES that the Prosecutor may not use the transcript of the interview of witness 561, disclosed without any Kinyarwanda audio or transcript, identified in paragraph 6 of the present decision;

ORDERS the Prosecutor to provide, by 31 August 2011, either: (i) full written translations of the Interviews in French or transcriptions in Kinyarwanda or (ii) French summaries of those Interviews; and

CONFIRMS the Postponement Decision, postponing the start of the confirmation hearing to 16 September 2011 with proceedings continuing on 19 and 20 September 2011.

Done in English and French, the English version being authoritative.

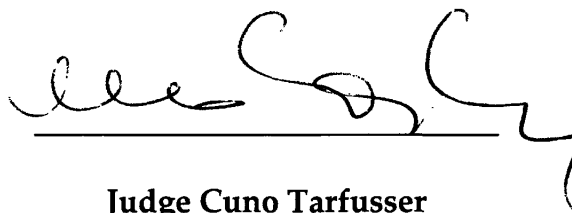
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Judge Sanji Mmasenono Monageng

Presiding Judge

A handwritten signature in black ink, featuring a large, stylized 'S' and 'i', positioned above the name of Judge Sylvia Steiner.

Judge Sylvia Steiner

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above the name of Judge Cuno Tarfusser.

Judge Cuno Tarfusser

Dated this Tuesday, 16 August 2011

At The Hague, The Netherlands